IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 2010 of 2004
in
SPECIAL CIVIL APPLICATION No 9044 of 2004
with
CIVIL APPLICATION No 9028 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.H.WAGHELA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NETLON INDIA

Versus

BIPIN V. PATEL

Appearance:

1. LETTERS PATENT APPEAL No. 2010 of 2004
MR NK MAJMUDAR for Appellant No.
MR NR SHAHANI for Respondent No. 1
..... for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 02/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.H.WAGHELA)

1. Invoking clause 15 of the Letters Patent, this appeal is preferred from the order of the learned Single Judge whereby the petition of the respondent herein has been admitted and interim relief, in effect, of restraining the appellants from altering the conditions of service of the respondent is granted after hearing the parties. The respondent prayed for quashing the order of the Labour Court refusing interim relief while the application of the respondent under Section 33A of the Industrial Disputes Act, 1947 (for short "the Act") was pending. Although that petition was styled as one under Articles 226 and 227 of the Constitution, the main prayers were to call for the record and proceedings of the complaint of the respondent pending in the Labour Court and to quash the interim order refusing to grant interim relief in favour of the respondent-workman. Therefore, if we were inclined to accept the first submission of the appellants that the petition of the respondent was maintainable only under Article 227 and the learned Single Judge ought not to have interfered in exercise of limited jurisdiction of the Court, this appeal would not have been maintainable. However, we have heard the learned counsel at length on all issues that were raised on behalf of the appellants.

2. The relevant facts, in brief, emerging from the record are that the respondent-workman was appointed by the appellant as a Trainee Operator Gr.II by appointment letter dated 17.7.1997 of which the important conditions read as under:-

"5. You will be liable to be transferred to any other Division of the Company on requirement.
.....

7. You shall be governed by the Standing Orders and the rules and regulations of the Company as applicable to you from time to time."

After completion of years of continuous service, the respondent was sought to be transferred by order dated 7.1.2004 from the appellants' Palej factory to their office in New Delhi and by the same order it was stipulated as under:-

"On your transfer and upon your joining at Delhi, you will stand promoted to S-II grade as

Warehouse Assistant with revised salary details as provided below in the scale of Rs.1720-50-3620-55-4445. ... ...

You will be based at the warehouse location and will be responsible for proper despatch and control of the warehouse. ....

Apart from these changes, other terms and conditions of your employment remains unaltered including leave entitlement etc. You will be required to follow the working hours, weekly off, holidays etc. as applicable to our Delhi office. ... .

As you stand relieved from Palej factory on 9th January 2004 at the close of your shift timings, you will cease to be on the rolls of our Palej factory thereafter.

Kindly note that all future correspondence from you should be addressed to the Regional Manager, Delhi, your reporting/ sanctioning authority who will be dealing with the same henceforth."

An endorsement appears to have been made by the respondent below the aforesaid order of transfer to state that, "since the above letter is in English and I am unable to understand it, please give me in Gujarati by today evening - under protest."

3. There is no dispute about the fact that a reference of the industrial dispute in which bonus at the rate of 20% is claimed is pending in the Labour Court, Bharuch vide Reference No.12 of 2002. It is the case of the respondent all throughout that he was being victimized for espousing the cause of the workmen and their union and that the transfer was malafide, that no work of Machine Operator was available at Delhi-warehouse and that he had no desire to work on the post to which he was promoted. It is also not disputed that the respondent is without job since the date of his transfer and he has, besides filing the complaint under Section 33A of the Act, made a complaint about the offence of "unfair labour practice" allegedly committed by the appellant. According to communication dated 5.4.2004 of the office of the Assistant Commissioner of Labour, the complaint has been, after issuing show cause notice to and hearing the appellant, forwarded for approval of prosecution.

4. What stands out from the record of facts is that the main application under Section 33A of the Act is pending and what was decided was an application for interim relief after prima-facie examination of the contentions of the parties. When the respondent approached the High Court to challenge that order of the Labour Court refusing interim relief, the High Court has admitted the petition and granted the interim relief after dealing with the contentions of the appellants. It is clear from the reading of the impugned order that the appellants' contentions were only to the effect that a writ petition was not maintainable against a private company and an application under Section 33A of the Act was not maintainable as the dispute regarding transfer was not connected with the main dispute or a matter related thereto.

5. Learned counsel Mr NK Majmudar relied upon the judgment of the Supreme Court in Management of Cipla Ltd. vs. Jayakumar R and another reported in 1998 (I) LLJ 460 to submit that the condition of transfer was there in the appointment order of the respondent and transfer accordingly could not be held to be a change in the conditions of service. It was, however, seen that, in that judgment, no factual basis for the contention that the workman was a trade union leader or that the transfer was made with an ulterior purpose was found. It was in that context observed by the Apex Court as under:-

> "It was for the respondent to state in the said application that he was a member of the Managing Committee or was involved with the trade union activities and that his transfer was for a malafide reason and amounted to unfair labour practice."

In contrast, such averments are found in the facts of the present case.

5.1 A Full Bench decision of the Madras High Court in P. Pitchumani and others vs. Management of Sri Chakra Tyres Ltd. reported in 2004 LLR 764 was cited to submit that employees of a private company cannot challenge their transfer by invoking writ jurisdiction of the High Court.

5.2 The judgment of the Supreme Court in Blue Star Employees Union vs. Ex.Officio, Principal Secretary to the Government and Another reported in 2000 (II) LLJ 1398 was relied upon to submit that Section 33A of the ID Act

involves consideration of two aspects of the matter viz. (i) whether there has been any violation of the provisions of Section 33 of the Act and (ii) whether the act complained of was justified or not. Therefore, violation or contravention of Section 33 would be the justification for authority concerned to entertain application under Section 33A.

5.3 It was also argued that the respondent could have only raised a substantive industrial dispute which could have been referred under Section 10 of the Act and grant of interim relief by the impugned order practically amounted to allowing the petition and such relief could not have been granted.

6. Learned counsel Mr NR Shahani, who appeared for the respondent-workman, without and before notice being issued in this appeal, submitted that the order transferring the respondent was made by the appellants in peculiar facts and circumstances where there was no valid or bona fide reason and no justification for the transfer; except to remove the respondent from the place from where he could pursue the main industrial dispute of bonus. As stated in the original application of the respondent, he has been challenging the award obtained by the appellants and that matter was pending in the High Court; that the respondent being a union leader, he was discriminated against and victimized even as the demand for full bonus was being agitated by him and the conciliation in that regard having failed, the industrial dispute was referred and was pending. He has alleged that there is no post and no work of Machine Operator at Delhi office of the appellants and it was by way of victimization and malafide exercise of power that the respondent was sought to be promoted and transferred. That it was impossible for him to live and maintain his family for the additional wages of Rs.200/-p.m., over and above, Rs.3260/- which was his wages as Operator living in a small taluka place. It was also pointed out from the record that the respondent was immediately relieved from his work and was not paid any wages since then despite the impugned order dated 25.10.2004 and that he was not allowed to resume his duties resulting practically into discharge from service without any compensation or wages whatsoever.

6.1 Mr Shahani relied upon the judgment of the Kerala High Court in Bhaskaran Nair vs. Management, Premier Tyres Ltd. and another reported in 1976 (II) LLJ 101 emphasizing the following observations :-

"... ... Even if the standing orders provide that workmen are liable to be transferred from factory at Kalamassery to any other establishments of the company inside or outside the State of Kerala, if such transfer really works out prejudicial to the petitioner and was a sort of victimization on account of his trade union activities, then certainly such transfer would be violative of Section 33."

7. While considering the rival contentions and the facts so far on record, we are having to keep in mind the fact that the petition of the respondent is pending in the Court and interim relief has been granted by the impugned order on consideration of two contentions that were raised by the appellants as mentioned hereinabove. Even that order granting interim relief only reversed the order of the Labour Court by which interim relief was refused while the main application of the respondent is pending in the Labour Court. Therefore, it would be hazardous and improper to express any final opinion on the factual or legal aspect of the matter except to the extent it is necessary to decide this appeal.

8. Having regard to the peculiar facts of the case, we are of the prima-facie opinion that the petition of the respondent could have been appropriately entertained under Article 227 of the Constitution and an appeal preferred from the order appropriately made in exercise of the powers under Article 227 of the Constitution would not be maintainable. Apart from that, since, admittedly the only case of transfer by the appellants of a workman is that of the respondent and since he appears to be an active leader of the trade union agitating demands, the order of transfer, prima-facie, appears to be in colorable exercise of power. The order of transfer being admittedly as well an order of promotion promoting the respondent to a so-called higher post, it, in effect, sought to transfer the workman out of his cadre and out of the whole State of Gujarat, which would necessarily have an impact on the prosecution of the industrial disputes which are admittedly pending. Since the evidence is yet to be led before the Labour court, it is not clear whether all the workmen lead by the respondent are connected with the dispute and whether the matter of transfer is connected with the dispute. In such circumstances, the objections of the appellant to the grant of interim relief that the petition of the respondent was not maintainable against the private company and to the effect that the original application under Section 33A of the Act was not maintainable appear

to have been correctly rejected at the admission stage and grant of interim relief appear to be just and proper in the facts and circumstances of the respondent practically losing his job and livelihood while pursuing the industrial dispute. As held by the Apex Court in Deoraj vs. State of Maharashtra (2004 (4) SCC 697), in rare and exceptional cases the Court may grant interim relief though it may amount to granting the final relief if it is satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing and if at the end the Court would not be able to vindicate the cause of justice.

9. We have also to notice the fact that this is the third round of litigation on an interlocutory matter while the respondent is out of job and new and novel grounds are sought to be agitated for the first time in this appeal as also the fact that the respondent has been constrained to appear through advocate throughout the proceedings before the High Court. There are reasons to believe that transfer, promotion and litigations are thrust upon the respondent to keep him away from the pursuit of the pending industrial dispute and the transfer is prima facie found to be by way of an unfair labour practice amounting to an offence punishable under Section 25U of the Act, which may as well be found to be an illegal change in relation to a matter connected with the pending industrial dispute.

10. Having regard to the above facts, we reject this appeal with cost of Rs.3000/- which shall be paid by the appellant to respondent No.1 along with the wages for the period from January 2004 to November 2004 by 15th December 2004.

As the appeal itself is rejected, the civil application is also disposed of as rejected.

11. The request of the learned counsel for the appellants to stay the operation of the above directions for a period of four weeks is also rejected.

(M.S. SHAH, J.)

(D.H. WAGHELA,J.)

zgs/-